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252331—53

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 763

UNITED STATES OF AMERICA, PETITIONER

v.

CARROLL CONSTRUCTION COMPANY AND THE STATE OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Washington entered October 16, 1952, affirming the decision of the Superior Court of Washington entered February 27, 1952.

OPINIONS BELOW

The memorandum opinion of the Superior Court of Washington (R. 7–9) is not reported. The opinion of the Supreme Court of Washington (R. 69–71) is reported at 249 P. 2d 234.

JURISDICTION

The opinion of the Supreme Court of Washington was entered October 16, 1952. (R. 69.)

certiorari to and including May 2, 1953. The ju-

The petition of the United States for a rehearing was denied and the judgment of the Supreme Court of Washington was entered on December 4, 1952. (R. 73, 74.) On March 4, 1953, Mr. Justice Douglas extended the time for filing a petition for a writ of risdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

This is a suit arising out of the conflicting tax claims of the United States and the State of Washington to property in the possession of the receiver for the taxpayer. In the trial court (the Superior Court of Washington), the United States asserted its right and priority over the State of Washington under Section 3466 of the Revised Statutes. That court held that the State of Washington was entitled to priority over the United States, specifically rejecting the contention of the United States as to Section 3466. (R. 7–9.) In a petition for rehearing, the United States called to that court's attention the provisions of Sections 3670 to 3672 of the Internal Revenue Code. The final order of the trial court, however, awarded priority to the State of Washington. (R. 11–14.) On appeal to the Supreme Court of Washington, the United States relied primarily upon Section 3466 of the Revised Statutes. That court held that the State of Washington had priority over the United States, also specifically rejecting the contention of the United States as to Section 3466. (R. 69–71.) A timely petition for rehearing en banc again raised primarily the

question of the application of Section 3466. This petition was denied. (R. 73.)

QUESTION PRESENTED

Whether the priority accorded claims of the United States against an insolvent debtor by R. S. 3466 is defeated by the mere filing of notice of a state tax lien against specified property of the debtor, where the state has taken no steps to divest the debtor of either title or possession.

STATUTES INVOLVED

Revised Statutes of the United States:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed. [31 U. S. C. 1946 ed., Sec. 191.]

Laws of Washington (1945), c. 35:

> SEC. 93 [as amended by Sec. 19, c. 215, Laws of 1947 (Remington's Revised

Statutes of Washington (1947 Supp.), Sec. 9998–231)]. *Lien for Contributions Generally.* The claim of the Unemployment Compensation Division for any contributions, including interest thereon, not paid when due, shall be a lien prior to all other liens or claims and on a parity with prior tax liens against all property of the employer. In order to avail itself of the lien hereby created, the Unemployment Compensation Division shall file with the County Auditor of the county in which such property is located a statement in writing describing in general terms the specific property upon which the lien is claimed and stating the amount of the lien claimed by the division. The lien shall only attach to the property and be effective from the date of filing of such statement. This lien shall be separate and apart from, and in addition to, any other lien or claim created by, or provided for in, this act. * * *

SEC. 97 (Remington's Revised Statutes of Washington (1945 Supp.), Sec. 9998–235). *Distraint, seizure, and sale.* If the amount of contributions or interest assessed by the Commissioner by order and notice of assessment provided in this act is not paid within ten days after the service or mailing of the order and notice of assessment, the Commissioner or his duly authorized representative may collect the amount stated in said assessment by the distraint, seizure, and sale of the property, goods, chattels,

and effects of said delinquent employer. There shall be exempt from distraint and sale under this section such goods and property as are exempt from execution under the laws of this state.

STATEMENT

This case involves the relative superiority of tax claims as between the United States and the State of Washington against the estate of an insolvent corporation in receivership, the taxpayer, Carroll Construction Company. A temporary receiver was appointed for the taxpayer on August 30, 1950, and a permanent receiver was appointed on September 20, 1950. The receiver took possession of all of the taxpayer's assets, and after their sale or other disposition the net proceeds in the hands of the receiver available for distribution to creditors amounted to $6,540.74. (R. 1–5.)[1]

The United States filed with the receiver claims for various unpaid taxes in the total amount of $28,398.45, plus interest and penalties. With respect to $15,241.84 of this amount, the assessment list had been received by the Collector on August 11, 1950, and notice of tax lien had been filed on August 16, 1950, in accordance with the provisions of the Internal Revenue Code (Sections 3670–3672). (R. 5.)

[1] The case was submitted below on an agreed statement of facts (R. 1–7.)

The State of Washington also filed with the receiver a claim for state unemployment taxes in the amount of $3,057.88 and interest. On August 8, 1950, the Commissioner of the State Unemployment Security Department had filed with the Auditor of Pierce County, Washington, a notice of lien claim against specified office equipment of the taxpayer, in accordance with the laws of the State of Washington (*supra*, pp. 3–5). Some of the items listed in this notice came into the possession of the receiver, and were sold by him for $619.84. (R. 6.)

The Superior Court of Washington ruled that the State's tax claim was entitled to priority of payment from the estate of the insolvent taxpayer to the extent of $619.84, the amount for which the receiver sold property listed in the State's notice of lien. (R. 6, 7–9.) The Supreme Court of Washington affirmed, holding that under its own decisions the mere filing of the notice of lien sufficed to perfect the State's tax lien and to defeat the priority accorded claims of the United States by Section 3466 of the Revised Statutes. (R. 69–71.)

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding, contrary to the decisions of this Court, that the tax lien of the State of Washington was a perfected lien for purposes of apply-

ing the provisions of Section 3466 of the Revised Statutes.

2. In holding, contrary to the provisions of Section 3466 of the Revised Statutes, that the tax claim of the State of Washington was entitled to priority of payment over that of the United States in the collection of debts owing by the insolvent taxpayer.

REASONS FOR GRANTING THE WRIT

The question in this case is the same as one of the questions decided by this Court in *United States* v. *Gilbert Associates, Inc.*, No. 440, this Term, decided April 6, 1953. Like that case, it illustrates a tendency of some state courts to subordinate tax claims of the United States against an insolvent debtor to those of the state or its subdivisions, in contravention of the federal priority statute (R. S. 3466, *supra*, p. 3) and the controlling decisions of this Court. Here, the Supreme Court of Washington has held (R. 70–71) that "under Washington law" a tax lien of the State was sufficiently "perfected" to defeat the priority accorded claims of the United States by the federal priority statute, although the taxpayer had not been divested of any of the property subject to the lien and a receiver acquired both title and possession. On the basis of the undisputed facts, and on the authority of this Court's decisions in the *Gilbert* and numerous other cases involving application of the federal

priority statute, we suggest that the writ of certiorari should be granted and the case disposed of summarily.

1. Section 3466 of the Revised Statutes prescribes that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied." In a series of cases this Court has consistently held that an adverse lien which has not become both "specific" and "perfected" before the debtor's insolvency cannot serve to deprive the United States of the right to priority of payment of its claims. *United States* v. *Gilbert Associates, Inc., supra; Illinois* v. *Campbell,* 329 U. S. 362; *United States* v. *Waddill Co.,* 323 U. S. 353; *United States* v. *Texas,* 314 U. S. 480; *New York* v. *Maclay,* 288 U. S. 290; *Spokane County* v. *United States,* 279 U. S. 80; *United States* v. *Oklahoma,* 261 U. S. 253; *Thelusson* v. *Smith,* 2 Wheat. 396; *Field* v. *United States,* 9 Pet. 182; *Conard* v. *Atlantic Insurance Co.,* 1 Pet. 386; cf. *United States* v. *Security Tr. & Sav. Bk.,* 340 U. S. 47; *Massachusetts* v. *United States,* 333 U. S. 611; *Illinois* v. *United States,* 328 U. S. 8. To be "specific", the adverse lien must, among other requirements, attach to particular items of the debtor's property. *Illinois* v. *Campbell, supra* (pp. 373, 375–376); *United States* v. *Waddill Co., supra* (p. 359); *United States* v. *Texas, supra* (p. 485). To be "perfected", the lien must be enforced at least to the point of

divesting the debtor of either title or possession. *United States* v. *Gilbert Associates, Inc.*, (slip op. 5); *United States* v. *Security Trust & Savings Bank, supra,* at 51; *Illinois* v. *Campbell, supra,* at 375–376; *United States* v. *Waddill Co., supra,* at 357–360; *Thelusson* v. *Smith, supra.* Whether an adverse lien has become sufficiently specific and perfected to overcome the federal priority presents, of course, a federal question. The priority established by Congress in favor of the United States may not be impaired by state legislation or state court decisions creating interests in the debtor's property in favor of the state or third parties. *United States* v. *Gilbert Associates, Inc., supra; Illinois* v. *Campbell, supra,* at 371; *United States* v. *Waddill Co., supra,* at 357. In cases involving the application of R. S. 3466, "it has never been held sufficient to defeat the federal priority merely to show a lien effective to protect the lienor against others than the Government, but contingent upon taking subsequent steps for enforcing it." *United States* v. *Security Trust & Savings Bank, supra,* at 51. See also *Illinois* v. *Campbell, supra,* at 375.

In this case, the Supreme Court of Washington has held that the State had "perfected" its lien merely by filing a notice of lien against specific property, on the theory that under its own decisions "no distraint is necessary to perfect the lien." (R. 70–71.) In so holding it adopted a test

which is the very antithesis of that repeatedly applied by this Court. The State's lien "did not of its own force divest the taxpayer of either title or possession." *United States* v. *Texas, supra,* at 488. "At least until actual distraint [there was] * * * no transfer of title or possession relative to any property." *United States* v. *Waddill Co., supra,* at 360. "To permit the recording of the notices or the receiver's appointment, or both, in circumstances like these, to overcome the Government's priority would be in substance to overrule the numerous decisions cited in which liens no less 'specific and perfected' have been held impotent for that purpose." *Illinois* v. *Campbell, supra,* at 376. In the *Gilbert* case, in rejecting the claimed priority of a Town's tax claim, this Court reiterated (slip op. 5) that an adverse lien is not "perfected" unless it has been enforced to the point of divesting the debtor of title or possession, and that the "mere attachment of the Town's lien" did not give the Town priority over the United States.

Because no new question of law is presented, and the facts dispositive of this case have been stipulated (R. 1–7), we submit that this is an appropriate case for summary disposition on the authority of the Court's decision in the *Gilbert* case. Admittedly, the State took no steps whatever to enforce its lien, and consequently never acquired either title to or possession of the prop-

erty subject to the lien.[2] Its claim to priority of payment from the proceeds of the receiver's sale rests upon nothing more than the filing of a notice of lien against particular portions of the taxpayer's property. Like any other unperfected lien, the State's lien represented a mere power to divest the taxpayer of the property. Unless and until the power was exercised, the taxpayer remained the owner of the property, and the priority rights of the United States attached when the taxpayer became insolvent. As in the *Gilbert* case (slip op. 5), "There is no ground for the contention here that the [State] had perfected its lien by reducing the property to possession." To allow the decision below to stand would accord to tax claims of the State of Washington—or of any state which chooses to follow its example—a preference over tax claims not enjoyed by other states. It would invite similar departures by other courts from the controlling decisions of this Court. And it would undermine the "uniformity" of application of the federal taxing statute demanded by the *Gilbert* decision (slip op. 3).

2. This Court has, in the past, expressly posed but left unanswered the question of whether even a specific and perfected adverse lien can serve

[2] Section 97 of c. 35 of the 1945 Laws of Washington, *supra*, pp. 4–5, provides that if the tax is not paid within ten days after notice of assessment, "the Commissioner or his duly authorized representative may collect the amount stated in said assessment by the distraint, seizure, and sale of the property." No such action was taken here.

as an exception to the absolute priority accorded claims of the United States by the terms of R. S. 3466. *United States* v. *Waddill Co., supra,* at 355–356; *United States* v. *Texas, supra,* at 485–486; *New York* v. *Maclay, supra,* at 294; *Spokane County* v. *United States, supra,* at 95; *Michigan* v. *United States,* 317 U. S. 338, 341. "This Court has never actually held that there is such an exception." *United States* v. *Gilbert Associates, Inc.* (slip op. 4–5). In each instance, the Court has found it unnecessary to reach and decide the question, having concluded that the adverse lien was not sufficiently specific and perfected. Since the lien here involved was not a perfected one under the decisions of this Court, there is likewise no need in this case to decide whether, even if it were perfected, the claim of the State could take precedence over that of the United States. In the event, however, that it could be thought that the instant lien was a perfected one, then this case would squarely present the question of whether a specific and perfected lien has priority over the claim of the United States.[3]

[3] The tax claim of the United States is paramount to that of the State also under the federal tax lien statute (Internal Revenue Code, Sections 3670–3672), inasmuch as the State does not fall within the exceptions enumerated in Section 3672, and the notices of tax liens, which were filed by the Collector on August 16, 1950, far exceeded the amount of the State's tax lien (R. 5). See *United States* v. *Gilbert Associates, Inc., supra; United States* v. *Snyder,* 149 U. S. 210. The mere existence of the State's lien did not, of course,

CONCLUSION

The petition for a writ of certiorari should be granted, and the decision below reversed without argument or further briefs on the authority of *United States* v. *Gilbert Associates, Inc.*, decided April 6, 1953. In the alternative, the judgment of the court below should be vacated and the case remanded for its reconsideration in the light of that case.

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.

APRIL 1953.

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operate to divest the taxpayer of any of its property before the federal lien arose. *United States* v. *Security Trust & Savings Bank*, *supra*. However, there would appear to be no need to determine this question of the relative superiority of the two liens, under Sections 3670–3672, since the federal claim is entitled to priority of payment under R. S. 3466.

U. S. GOVERNMENT PRINTING OFFICE: 1953